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ROMULO RIMANDO

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**ROMULO RIMANDO,**  
  
**Plaintiff,**

**Case No. 5:08-cv-01874-JF**

**v.**

**ALUM ROCK UNION  
ELEMENTARY SCHOOL  
DISTRICT, MARIBEL GUIZAR-  
MAITA, INDIVIDUALLY,**

**PLAINTIFF'S MOTION FOR  
LEAVE TO SEEK  
ADMINISTRATIVE RELIEF**

**Defendant.**

**COMES NOW**, Plaintiff **ROMULO RIMANDO**, through undersigned counsel, who submits this motion for administrative relief in accordance with Local Rule 7-1(4), 7-4(b), 7-11, and 7-12 as follows:

Due to unforeseen preparations and evacuations of key office personnel in expectation of the arrival Hurricane Gustav in New Orleans where the undersigned lives and offices on August 29th, undersigned counsel was unable to electronically file Plaintiff's Memorandum in Opposition of Defendant's 12(b)(1) Motion to Dismiss on its due-date of Friday, August 29, 2008. Plaintiff requests that this

1 Honorable Court accept Plaintiff's Motion, which has been filed within 72 hours of  
2 its August 29, 2008 deadline -- Monday, September 1, 2008, from the city of  
3 Birmingham, AL.  
4

5 Plaintiff further requests this court allow said Memorandum to exceed the 25  
6 page limitation as provided in Local Rule 7-3. As opposing counsel was  
7 understandably unreachable the weekend of the filing of this motion, Plaintiff has  
8 been unable to propose a stipulation in accordance with Local Rules 7-11 and 7-12.  
9 However, to Plaintiff's belief, and through interaction with opposing counsel in  
10 this matter, the mover also wishes to conduct as thorough and meaningful briefing  
11 of these important constitutional issues as possible for the benefit of both parties,  
12 the Court, and the development of the law. Plaintiff does not believe the  
13 Defendants will be prejudiced by the submission of Plaintiff's Response within 36  
14 hours of its due date, under these circumstances.  
15  
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18

19 Plaintiff's Memorandum opposes Defendants' 12(b)(1) Motion to Dismiss,  
20 which turns on complex issues of constitutional law, and thus requires a more  
21 detailed discussion than can be articulately made in 25 pages. Plaintiff's Response  
22 is dependent upon a contemporaneously filed forty-page memorandum at this stage  
23 of the litigation. *See* Plaintiff's Memorandum in Opposition to Defendant's  
24 Motion to Dismiss attached to this Motion as Ex "A". Plaintiff's counsel  
25 originally prepared his Response in 12-point font. Upon correction of the font, in  
26  
27  
28

1 accordance with the Local Rules, the 25-page limitation has been exceeded.  
2 Notwithstanding, the entirety of the arguments and jurisprudence contained in  
3 Plaintiff's brief are essential to its presentation and all due consideration by the  
4 Court, for good cause shown, is requested so that the Court is fully briefed on this  
5 issue prior to oral argument docketed for September 19, 2008.  
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9

10 Dated this 1<sup>st</sup> day of September, 2008.  
11  
12

13 Respectfully Submitted:  
14  
15

16 *s/George C. Aucoin*

17 **GEORGE C. AUCOIN**

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24 ***COUNSEL FOR PLAINTIFF***  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 1st day of September, 2008, I electronically filed the foregoing with the Clerk of Court CM/ECF system, which will automatically send notice to all counsel of record.

s/George C. Aucoin  
GEORGE C. AUCOIN

**EXHIBIT "A"**

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Attorney for Plaintiff  
ROMULO RIMANDO

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**v.**

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DISTRICT, MARIBEL GUIZAR-  
MAITA, INDIVIDUALLY,**

**Defendant.**

**Case No. CV 5:08-cv-01874-JF**

**PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS**

**(Fed.R.Civ.P. 12)**



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**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S  
MOTION TO DISMISS**

**I. INTRODUCTION**

On April 8, 2008 Romulo Rimando (“Plaintiff”) filed a complaint against Alum Rock Union Elementary School District ("Alum Rock"), a California School District, and District employee Guizar-Maita (“Maita”) (collectively, “Defendants”), in her individual capacity, under USERRA (Uniformed Services Employment & Reemployment Rights Act) and the California Military and Veterans Code. (*See generally*, Complaint). Rimando asserted claims including liquidated damages, back-pay, retirement benefits, reinstatement, pre-judgment interest, post-judgment interest, attorney’s fees, costs and civil fines. (*Id.*).

In response, Defendants filed a Fed. R. Civ. P. 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction (*See generally*, Motion and Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss). Specifically, Defendants claim they are entitled to dismissal of all of Plaintiff’s claims including Plaintiff’s USERRA claims and Plaintiff’s supplemental state law claims (*Id.*). Alternatively, Defendants argue that all of Plaintiffs federal and state law claims Alum Rock should be dismissed based upon Eleventh Amendment Immunity, and that all of Plaintiff’s state law claims for damages

1 and other forms of monetary relief should be dismissed based upon Plaintiff's  
2 alleged "failure to comply with GTCA and related District Administration  
3 Regulation 3320." (*Id.*).  
4

5 Plaintiff contends, however, that: (1) jurisdiction in this case is proper in  
6 the U.S. District Court for the Northern District of California as USERRA  
7 provides for federal jurisdiction regarding USERRA claims against state  
8 employers; (2) Defendants are not entitled to Eleventh Amendment immunity as  
9 the Eleventh Amendment does not bar a USERRA Claims; (3) in particular, The  
10 Eleventh Amendment Does Not Bar A Claim Against the Individual Defendants  
11 Named In the complaint; (4) stripping military reservists of their USERRA rights  
12 under the guise of Eleventh Amendment Immunity is inequitable and in violation  
13 of the purpose and scope of USERRA; and (5) Plaintiff's state-law claims are not  
14 barred by noncompliance with GTCA as USERRA trumps state-law and affords  
15 claimants the right to retain counsel at any time.  
16  
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19

## 20 **II. Statement of Issues to be Decided**

21  
22 The Plaintiff provides the following issues for this Court's decision:

23 1. Whether federal question jurisdiction exists for a USERRA claim  
24 against a state entity given the provision in USERRA that a private individual's  
25 USERRA suit against a state employer "may be brought in a State court of  
26 competent jurisdiction in accordance with the laws of the State;"  
27  
28

1           2.     Whether a private individual may pursue USERRA claims against  
2 his former individual supervisors at his state employer who made decisions in  
3 violation of USERRA given USERRA's specific definition of "employer" as  
4 allowing for suit against individual supervisors;  
5

6           3.     Whether Plaintiff's claims, if properly brought in federal district  
7 court, are barred by the Eleventh Amendment; and  
8

9           4.     Whether Plaintiff's state-law claims for damages are barred under  
10 the GTCA and related District Administrative Regulation 3320.  
11

### 12           **III.    Statement of Relevant Facts**

13           Plaintiff was first employed by Alum Rock as a Telecommunications  
14 Technician on October 30, 1995 and promoted to Telecommunications  
15 Supervisor on October 1, 1997. Prior to being employed by Alum Rock, Plaintiff  
16 served as an enlisted man in the United States Army Reserve from November 5,  
17 1990 until December 21, 1998. Upon his release from this initial period of  
18 Reserve duty, Plaintiff returned to civilian life. On August 11, 2000, Plaintiff  
19 reenlisted in the U.S. Army Reserve and remained continuously as a drilling  
20 reservist in Reserve status until the present. At all times relevant to this litigation,  
21 Plaintiff was and remains a Sergeant First Class in the United States Army  
22 Reserve.  
23  
24  
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1 From February 11, 2007 through June 14, 2007, Plaintiff received active  
2 duty orders for training which brought him to an active duty status for a period of  
3 military training at the Advanced Non-Commissioned Officer's Course. This  
4 period of service included Plaintiff traveling to Fort Gordon, Georgia and serving  
5 as a student in the Advanced Non-commissioned Officers course for a period of  
6 129 days, exclusive of travel time. Upon receiving the military orders, Plaintiff  
7 provided his supervisor at Alum Rock with a copy of those orders as a  
8 notification of the existence of the orders and of the dates of service contained  
9 therein.  
10  
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12

13 Following Plaintiff return to California, he was released from active duty  
14 and returned to his prior Reserve status effective June 17, 2007. Plaintiff received  
15 an Honorable Discharge from his period of active duty service. After leaving  
16 active duty with the U.S. Army on June 17, 2007, Plaintiff sought reemployment  
17 with Alum Rock on June 20, 2007, following his discharge and return to civilian  
18 life. Plaintiff was reemployed by Alum Rock as a Telecommunications  
19 Supervisor on June 25, 2007.  
20  
21  
22

23 After being reemployed as a Telecommunications Supervisor by Alum  
24 Rock on June 25, 2007, and before the expiration of 180 days of required  
25 reemployment under federal statute by Alum Rock, Plaintiff was terminated from  
26 the defendants' employ on August 9, 2007. During the period Plaintiff was  
27  
28



1 employed by Alum Rock between 1995 and 2007, disparagement of his U.S.  
2 Army military service was voiced by a member of the Telecommunications  
3 Management Team, Maribel Guizar-Maita who said “Watch out for this guy—  
4 he’s always away on military duty” in comments directed to Alum Rock’s chief  
5 technology officer and others.  
6

7  
8 On May 10 2007, Defendant Maribel Guizar-Maita identified Plaintiff as  
9 her choice for termination while he was away on military duty during a closed  
10 door session of the Alum Rock Union School District Board Members.  
11 Plaintiff’s obligation for military service and actual military service time away  
12 from the defendant employer was, in whole or in part, a motivating factor in  
13 Defendants’ termination of Plaintiff’s employ at Alum Rock. Alum Rock failed  
14 to reemploy Plaintiff to an employment position of similar status, seniority and  
15 pay for a period of 180 days upon his return from active duty service in June of  
16 2007.  
17

18  
19 Alum Rock discharged Plaintiff from employment less than 180 days from  
20 his date of reemployment after a period of service of more than 31 days without  
21 cause. The reason given for Plaintiff’s termination from employment by Alum  
22 Rock on his effective date of termination of August 9, 2007, was “lack of work”  
23 and “lack of funds” despite hiring two new communications supervisors from  
24  
25  
26  
27  
28

1 within the Alum Rock telecommunications organization contemporaneous with  
2 the firing of Plaintiff.

3 On April 8, 2008 Plaintiff filed a Complaint, alleging that Defendant  
4 violated provisions of the California Military and Veterans' Code § 389 et seq.,  
5 including, but not limited to, §§ 394 and 395 and USERRA, 38 U.S.C. § 4301 et  
6 seq., including, but not limited to, 38 U.S.C. §§ 4312, 4313, and 4316(c). (*See*  
7 *Generally*, Complaint). Specifically, Plaintiff alleged Alum Rock Union  
8 Elementary School District and Maribel Guizar-Maita's actions were willful  
9 violations of USERRA and the California Military and Veterans' Code, such that  
10 punitive and/or liquidated damages are legally appropriate.  
11

12 In response, Defendants filed a Fed. R. Civ. P. 12(b)(1) Motion to Dismiss  
13 for lack of subject matter jurisdiction (*See generally*, Motion and Memorandum  
14 of Points and Authorities in Support of Defendant's Motion to Dismiss).  
15 Specifically, Defendants claim they are entitled to dismissal of all of Plaintiff's  
16 claims including Plaintiff's USERRA claims and Plaintiff's supplemental state  
17 law claims (*Id.*). Alternatively, Defendants argue that all of Plaintiff's federal and  
18 state law claims Alum Rock should be dismissed based upon Eleventh  
19 Amendment Immunity, and that all of Plaintiff's state law claims for damages  
20 and other forms of monetary relief should be dismissed based upon Plaintiff's  
21  
22  
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1 alleged “failure to comply with GTCA and related District Administration  
2 Regulation 3320.” (*Id.*).

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4 Rock on June 25, 2007, and before the expiration of 180 days of required  
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6 the defendants’ employ on August 9, 2007. During the period Plaintiff was  
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9 Management Team, Maribel Guizar-Maita who said “Watch out for this guy—  
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11 technology officer and others.

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13 her choice for termination while he was away on military duty during a closed  
14 door session of the Alum Rock Union School District Board Members.  
15 Plaintiff’s obligation for military service and actual military service time away  
16 from the defendant employer was, in whole or in part, a motivating factor in  
17 Defendants’ termination of Plaintiff’s employ at Alum Rock. Alum Rock failed  
18 to reemploy Plaintiff to an employment position of similar status, seniority and  
19 pay for a period of 180 days upon his return from active duty service in June of  
20 2007.

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2 his date of reemployment after a period of service of more than 31 days without  
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6 within the Alum Rock telecommunications organization contemporaneous with  
7 the firing of Plaintiff.  
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14 *Generally*, Complaint). Specifically, Plaintiff alleged Alum Rock Union  
15 Elementary School District and Maribel Guizar-Maita's actions were willful  
16 violations of USERRA and the California Military and Veterans' Code, such that  
17 punitive and/or liquidated damages are legally appropriate.  
18  
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24 of Points and Authorities in Support of Defendant's Motion to Dismiss).  
25 Specifically, Defendants claim they are entitled to dismissal of all of Plaintiff's  
26 claims including Plaintiff's USERRA claims and Plaintiff's supplemental state  
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1 law claims (*Id.*). Alternatively, Defendants argue that all of Plaintiffs federal and  
 2 state law claims Alum Rock should be dismissed based upon Eleventh  
 3 Amendment Immunity, and that all of Plaintiff's state law claims for damages  
 4 and other forms of monetary relief should be dismissed based upon Plaintiff's  
 5 alleged "failure to comply with GTCA and related District Administration  
 6 Regulation 3320." (*Id.*).  
 7  
 8

#### 9 **IV. The Purpose and Scope of USERRA**

10  
 11 § 4301. Purposes; sense of Congress

12  
 13 (a) The purposes of this chapter are--

14 (1) **to encourage noncareer service** in the uniformed services by  
 15 eliminating or minimizing the disadvantages to civilian careers and  
 16 employment which can result from such service;

17 (2) **to minimize the disruption** to the lives of persons performing service  
 18 in the uniformed services as well as to their employers, their fellow  
 19 employees, and their communities, by providing for the prompt  
 20 reemployment of such persons upon their completion of such service; and

21 (3) **to prohibit discrimination** against persons because of their service in  
 22 the uniformed services.  
 23

#### 24 **V. Argument**

##### 25 **A. Venue for Plaintiff's USERRA Claim is Proper in U.S. District** 26 **Court** 27 28

Because U.S.C. 38 §4323(b)(1)-(3) provides a only a permissive grant of authority for Plaintiffs as private citizens to bring action against state employers, and that option in no way negates the provisions of 28 U.S.C. §1331, which provides for federal jurisdiction in cases which “arise under” federal law. Furthermore, 38 U.S.C. §4303, in conjunction with 28 U.S.C. §1331, allows for claims against individuals as employers in federal court. Also, there is ample authority for the proposition that the Eleventh Amendment does not generally operate to bar the assertion of a USERRA claim against a state.

**i. Despite the 1998 USERRA Amendment, There Is Federal Jurisdiction For A Private USERRA Claim Against A State Employer.**

38 U.S.C. § 4323 (b)(1)-(3) states as follows:

**(b) Jurisdiction**

- (1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
- (2) In the case of action against a State (as an employer) by a person, the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State.
- (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

1 Defendants assert that Plaintiff does not have jurisdiction over this claim  
2 pursuant to 38 U.S.C. § 4323(b)(3). (*See*, Memorandum in Support of Motion to  
3 Dismiss at 6). The defendants argue that a 1998 amendment to USERRA  
4 deprives the federal courts of a particular class of USERRA claims, claims by  
5 individuals against states as employers. (*Id.* at 7). However, as will be seen in  
6 detail herein, the defendants' argument fails because subsequent Supreme Court  
7 opinions have held that, contrary to the case law relied upon by defendants, a  
8 grant of jurisdiction to state courts framed such that a plaintiff "may" bring or  
9 maintain a suit in state court does not grant exclusive jurisdiction to the state  
10 courts. Rather, general federal question or federal diversity jurisdiction statutes  
11 are still applicable to the matter. In this instance, the general federal question, or  
12 more correctly, "arising under" jurisdictional statute, 28 U.S.C. §1331, therefore  
13 supports the maintenance by this Honorable Court of jurisdiction over this matter.  
14  
15  
16  
17  
18

19 The starting point for an analysis of the jurisdictional issues presented in  
20 this matter is, of course, the statutory language. Prior to the 1998 revision of  
21 USERRA, the relevant portion of the statute provided:  
22  
23

24 **(b) In the case of an action against a State as an**  
25 **employer, the appropriate district court is the court**  
26 **for any district in which the State exercises any**  
27 **authority or carries out any function. In the case of a**  
28 **private employer the appropriate district court is the**

1 district court for any district in which the private  
2 employer of the person maintains a place of business.

3  
4 **(c)(1)(A) The district courts of the United States shall**  
5 **have jurisdiction, upon the filing of a complaint,**  
6 **motion, petition, or other appropriate pleading by or**  
7 **on behalf of the person claiming a right or benefit**  
8 **under this chapter--**

9  
10 **(i)** to require the employer to comply with the provisions  
11 of this chapter;

12  
13 **(ii)** to require the employer to compensate the person for  
14 any loss of wages or benefits suffered by reason of such  
15 employer's failure to comply with the provisions of this  
16 chapter; and

17  
18 **(iii)** to require the employer to pay the person an amount  
19 equal to the amount referred to in clause (ii) as liquidated  
20 damages, if the court determines that the employer's  
21 failure to comply with the provisions of this chapter was  
22 willful.

23  
24 38 U.S.C. §4323 (Pre-1998 amendment) (bold emphasis added).

25 The relevant portion of USERRA after the 1998 revision  
26 provides:  
27  
28



1           **(b) Jurisdiction.--(1)** In the case of an action against a  
 2           State (as an employer) or a private employer commenced  
 3           by the United States, the district courts of the United  
 4           States shall have jurisdiction over the action.

5  
 6           **(2) In the case of an action against a State (as an**  
 7           **employer) by a person, the action may be brought in a**  
 8           **State court of competent jurisdiction in accordance**  
 9           **with the laws of the State.**

10  
 11           **(3)** In the case of an action against a private employer by  
 12           a person, the district courts of the United States shall  
 13           have jurisdiction of the action.

14  
 15           38 U.S.C. §4323 (Post-1998 amendment, current law) (bold emphasis added).

16           One critical point must be noted from the plain statutory text, and that is  
 17           the statutory contraposition of the word "shall" in 38 U.S.C. §4323(b)(1) and (3)  
 18           with the word "may" in 38 U.S.C. §4323(b)(2).

19  
 20           At the heart of defendants' argument is a simple proposition. Prior to the  
 21           revision it was clear that all suits against states under USERRA, whether brought  
 22           by an individual or by the government were to be brought in federal court because  
 23           of the mandatory provision that, "district courts of the United States shall have  
 24           jurisdiction . . . ." 38 U.S.C. §4323(c)(1)(a) (Pre-1998 amendment). According to  
 25           the defendants' theory, when the statute was amended to provide that when a  
 26  
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1 private person sues a State to assert a USERRA claim, "the action may be brought  
2 in a State court of competent jurisdiction in accordance with the laws of the  
3 State[,]" this amended provision gave exclusive jurisdiction over such claims to  
4 state courts.  
5

6 The defendants cite various authorities for the proposition that this textual  
7 amendment to the statute gave exclusive jurisdiction over private USERRA  
8 claims against a State to state courts. Two such cases include *Valasquez v.*  
9 *Frapwell and Trustees of Indiana Univ.* 165 F.3d 593, 593-594 (7th Cir. 1999)  
10 (per curiam) and *Valadez v. Regents of the Univ. of Cal.*, 2005 WL 1541086 (E.D.  
11 Cal. 2005). It is noteworthy that the *Valadez* case in particular merely follows or  
12 adopts the holding of the Seventh Circuit per curiam opinion in *Valasquez*  
13 without any substantive discussion of the merits of the issue. *Valadez* 2005 WL  
14 1541086, at 3. Thus, *Valadez* adds little, if any, real weight of authority to the  
15 *Valasquez* opinion.  
16  
17  
18  
19

20 The *Valasquez* per curiam opinion cited considered the matter in a very  
21 conclusory way, as might be expected in a per curiam opinion. The per curiam  
22 opinion partially vacated the same court's earlier opinion as to Eleventh  
23 Amendment sovereign immunity on the grounds that the statutory revision  
24 deprived the court of jurisdiction to consider the matter. The relevant portion of  
25 the *Valesquez* per curiam opinion holds that:  
26  
27  
28

1 The amendment to USERRA, so far as bears on this case,  
2 adds a new section conferring only on state courts  
3 jurisdiction over suits against a state employer, 38 U.S.C.  
4 § 4323(b), and makes the new jurisdictional provision  
5 applicable to pending cases, Pub.L. No. 105-368, §  
6 211(b)(1), and hence to this case. The defendants argue  
7 that jurisdiction continues in the federal courts under the  
8 general federal question jurisdictional statute, 28 U.S.C.  
9 § 1331, which section 211 of the statute amending  
10 USERRA does not purport to repeal. The argument has  
11 no merit; Congress's intention to limit USERRA suits  
12 against states to state courts is unmistakable; the  
13 defendant's arguments that this case was finally decided  
14 because the district court issued a final decision and so  
15 the amendment is inapplicable, and that if it is applicable  
16 it is unconstitutional, also plainly lack merit.

17  
18 We conclude that we lacked jurisdiction over the  
19 plaintiff's USERRA claim, though not over his other  
20 claim, which is under Title VII of the Civil Rights Act of  
21 1974. We therefore vacate so much of our decision as  
22 relates to the state's Eleventh Amendment defense and, as  
23 is customary, *United States v. Munsingwear*, 340 U.S.  
24 36, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950), we also vacate  
25 the relevant ruling by the district court.

26  
27 Id. at 593-594.  
28

1 Plaintiff has, since the decision of this matter below, located a district court  
2 opinion which squarely addresses the issue and properly interprets "may" as being  
3 discretionary. In *McIntosh v. Partridge*, 2007 WL 1295836 (W.D. Tex.  
4 4/30/2007), the court considered the precise jurisdictional issue that is central to  
5 the present matter. In McIntosh the court held that:  
6

7  
8 The jurisdiction section of the act was amended in 1998.  
9 The act currently says that the federal district courts *shall*  
10 *have jurisdiction* in cases where the United States sues a  
11 state or where an individual sues a private employer. The  
12 current version also says that actions brought by an  
13 individual against a state *may be brought* in a state court.  
14 38 U.S.C. § 4323(b)(2) (emphasis added). The former  
15 version of the statute said that an action against a state  
16 lies in any federal district in that state, regardless of who  
17 sued it.  
18

19 The agency sees this change as evidence that Congress  
20 intended to restrict jurisdiction in cases brought by  
21 individuals against states. It is wrong. *May* is permissive-  
22 not exclusive or mandatory. If Congress had wanted to  
23 restrict cases, it would have said that actions *must be*  
24 brought in state courts. The statute allows for state-court  
25 jurisdiction without requiring it in suits by individuals  
26 against the state.  
27

28 McIntosh, 2007 WL 1295836 at \*2.

As will be seen herein, Judge Hughes' analysis in *McIntosh* is precisely in line with the Supreme Court's interpretation of the word "may," particularly when contraposed with "shall." There is a significant body of Supreme Court case law supporting the notion that the word "may" in this instance is not mandatory, but is permissive. In particular, interpreting the word "may" in statutory language as being discretionary, not mandatory, is appropriate when, as is the case in the present matter, it is found in close proximity to other clauses containing the word "shall". The Supreme Court has held that, "The word "may" customarily connotes discretion. That connotation is particularly apt where, as here, "may" is used contraposition to the word "shall[.]"" *Jama v. ICE*, 543 U.S. 335, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (internal citation omitted); see also, *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 126 S.Ct. 704, 708-709, 163 L.Ed.2d 547 (2005) (the word "may" connotes discretion where the statute has in other instances used the word "shall"), *Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (reasoning that "Congress' use of the permissive 'may' in one section contrasts with the legislators' use of a mandatory 'shall' in the same section").

In the present version of the statute the use of the word "may" is in perfect contraposition to the two bracketing clauses containing the mandatory "shall". Following the Supreme Court's holding in *Jama*, the only logical conclusion is

1 that the "may" contained in the current version of 28 U.S.C. 4323(b)(2) is merely  
2 discretionary, such that the plaintiff could have brought his suit in state court if he  
3 so elected, but does not serve to require that the plaintiff bring his claim in state  
4 court.  
5

6 More Recent Supreme Court Case Law Has Clarified That Grants Of  
7 Jurisdiction Containing "May" Are Discretionary, Not Mandatory. Well after the  
8 per curiam decision in *Valesquez* that underlies the defendants' arguments, the  
9 very same circuit, the Seventh Circuit, considered the subsequent development of  
10 the law concerning grants of jurisdiction to state courts in federal statutory  
11 clauses containing the word "may." Moreover, in its later opinion the Seventh  
12 Circuit considered the impact of a later Supreme Court case, *Breur v. Jim's*  
13 *Concrete of Brevard, Inc.*, 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923  
14 (2003). It is important to note that *Breur* was rendered after the Ninth Circuit  
15 TCPA case relied upon by the defendants below, *Murphey v. Lanier*, 204 F.3d  
16 911 (9<sup>th</sup> Cir. 2000), for the proposition that statutory language that a plaintiff  
17 "may" pursue a claim in state court precludes federal jurisdiction.  
18  
19  
20  
21  
22  
23

24 In *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7<sup>th</sup> Cir. 2005), the court  
25 considered whether federal jurisdiction existed for a private claim brought under  
26 the Telephone Consumer Protection Act. The Seventh Circuit's in depth  
27  
28

1 consideration of the matter is worth quoting at length as it is directly applicable to  
2 the present matter:

3  
4 That the controversy exceeds \$5 million is insufficient, however, if  
5 state courts have exclusive jurisdiction to resolve suits under the  
6 Telephone Consumer Protection Act. The district judge relied on [§](#)  
7 [227\(b\)\(3\)](#), which provides:

8  
9 A person or entity may, if otherwise permitted by the  
10 laws or rules of court of a State, bring in an appropriate  
11 court of that State-

12  
13 (A) an action based on a violation of this subsection or  
14 the regulations prescribed under this subsection to enjoin  
15 such violation,

16  
17 (B) an action to recover for actual monetary loss from  
18 such a violation, or to receive \$500 in damages for each  
19 such violation, whichever is greater, or

20  
21 (C) both such actions.

22 If the court finds that the defendant willfully or  
23 knowingly violated this subsection or the regulations  
24 prescribed under this subsection, the court may, in its  
25 discretion, increase the amount of the award to an  
26 amount equal to not more than 3 times the amount  
27 available under subparagraph (B) of this paragraph.  
28

1 This is the only portion of [§ 227](#) that expressly creates a private right  
 2 of action, and from its failure to authorize litigation in federal court  
 3 the district judge inferred that state jurisdiction must be exclusive.  
 4 Six courts of appeals have come to similar conclusions-though they  
 5 deal only with the question whether suit to enforce the Telephone  
 6 Consumer Protection Act may be filed or removed under the federal-  
 7 question jurisdiction, see [28 U.S.C. § 1331](#), and not whether such a  
 8 suit may be removed under the diversity jurisdiction. See [Foxhall](#)  
 9 [Realty Law Offices, Inc. v. Telecommunications Premium Services,](#)  
 10 [Ltd.](#), 156 F.3d 432 (2d Cir.1998); [ErieNet, Inc. v. Velocity Net, Inc.](#),  
 11 [156 F.3d 513 \(3d Cir.1998\)](#); [International Science & Technology](#)  
 12 [Institute, Inc. v. Inacom Communications, Inc.](#), 106 F.3d 1146 (4th  
 13 [Cir.1997\)](#); [Chair King, Inc. v. Houston Cellular Corp.](#), 131 F.3d 507  
 14 [\(5th Cir.1997\)](#); [Murphey v. Lanier](#), 204 F.3d 911 (9th Cir.2000);  
 15 [Nicholson v. Hooters of Augusta, Inc.](#), 136 F.3d 1287 (11th Cir.1998).  
 16 **But if state jurisdiction really is “exclusive,” then it knocks out §**  
 17 **1332 as well as [§ 1331](#).**

18  
 19 These decisions can not be reconciled with either [Grable & Sons](#)  
 20 [Metal Products, Inc. v. Darue Engineering & Manufacturing](#), --- U.S.  
 21 [----, 125 S.Ct. 2363, 162 L.Ed.2d 257 \(2005\)](#), or [Breuer v. Jim's](#)  
 22 [Concrete of Brevard, Inc.](#), 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d  
 23 [923 \(2003\)](#), both of which came after all of the six decisions to which  
 24 we have referred. [Grable](#) resolved a conflict in the Supreme Court's  
 25 own decisions by holding that **federal jurisdiction does not depend**  
 26 **on the existence of a private right of action under federal law.**  
 27 **And [Breuer](#) held that statutory permission to litigate a federal**  
 28



1 **claim in state court does not foreclose removal under the federal-**  
 2 **question jurisdiction.**

3  
 4 The Fair Labor Standards Act provides that a plaintiff may “maintain”  
 5 an action in either state or federal court, and Breuer insisted that a  
 6 right to “maintain” an action in state court forecloses its removal.  
 7 **The Justices concluded, however, that a plaintiff’s right to litigate**  
 8 **in state court does not block a defendant from electing a federal**  
 9 **forum, because 28 U.S.C. § 1441(a), the general removal**  
 10 **provision, allows the defendant to remove any claim under federal**  
 11 **law (or supported by diversity of citizenship) “[e]xcept as**  
 12 **otherwise expressly provided by Act of Congress”. The word**  
 13 **“maintain” in the FLSA is not an “express” prohibition on**  
 14 **removal, Breuer held.**

15  
 16 Brill, 427 F.3d at 449-450 (bold emphasis added).

17 The Seventh Circuit goes on to note the similar role of contraposition  
 18 between mandatory and permissive clauses in Brill as follows:  
 19

20 Section 227(b)(3) does not say that state jurisdiction is  
 21 “exclusive”-but another part of § 227 does use that word. Section  
 22 227(f)(1) permits the states themselves to bring actions based on a  
 23 pattern or practice of violations. Section 227(f)(2) continues:  
 24 “The district courts of the United States, the United States courts  
 25 of any territory, and the District Court of the United States for  
 26 the District of Columbia shall have exclusive jurisdiction over all  
 27 civil actions brought under this subsection.” How strange it  
 28 would be to make federal courts the exclusive forum for suits by

the states, while making state courts the exclusive forum for suits by private plaintiffs. But then [§ 227\(f\)\(2\)](#) is explicit about exclusivity, while [§ 227\(b\)\(3\)](#) is not; the natural inference is that the state forum mentioned in [§ 227\(b\)\(3\)](#) is optional rather than mandatory. Likewise the proviso that actions may be filed in state court “if otherwise permitted by the laws or rules of court of a State” implies that federal jurisdiction under [§ 1331](#) or [§ 1332](#) is available; otherwise where would victims go if a state elected not to entertain these suits? Our point is not that the reference to exclusive jurisdiction in [§ 227\(f\)\(2\)](#) shows that “Congress knows how” to limit litigation to one set of courts—references to the subjective knowledge of a body with two chambers and 535 members, and thus without a mind, rarely facilitate interpretation—but that differences in language within a single enactment imply differences in meaning as an objective matter. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L.Rev. 747 (1999). The contrast between [§ 227\(f\)\(2\)](#) and [§ 227\(b\)\(3\)](#) is baffling unless one provides exclusivity and the other doesn't.

*Brill*, 427 F.3d at 451 (bold emphasis added).

The logic of the Seventh Circuit in *Brill* is clear, and is in accord with the textual analysis of the statute that the amendment simply provides another forum option for a plaintiff without affecting the general rules of federal jurisdiction. As noted by the Supreme Court with regard to the Fair Labor Standards Act, and after examining a variety of exclusive jurisdiction provisions, in *Breur v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923

(2003), and equally applicable to the present matter: “When Congress has ‘wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms’ It has not done so here.”

Id., 123 S.Ct. at 1885-1886.<sup>1</sup>

Considering the foregoing, Plaintiff respectfully submits that it is clear that his claim is one for relief pursuant to USERRA, a federal statute. Congress authorized jurisdiction in federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Thus, the federal courts properly have jurisdiction over this matter.<sup>2</sup> That plaintiff has elected not to bring his suit in state court is his right, but it does not defeat federal jurisdiction. The defendants' arguments are, without substance in that they are based on a per curiam opinion that gives no analysis. Moreover, the very same

---

<sup>1</sup> Other courts have similarly applied *Breuer* as holding that permissive language in a federal statute allowing that a suit be brought or maintained in state court, in the absence of express language denying federal jurisdiction, allows for the exercise of general federal question jurisdiction and removal jurisdiction. *See Conine v. Universal Oil Product Co.*, 2006 WL 681180 (W.D.La. March 14, 2006) (FMLA suit that "may be maintained" in state court insufficient to create exclusive state court jurisdiction.); *Lindsay v. GEICO*, 448 F.3d 416 (D.C. Cir. 2006) (Recognizes rule from *Breuer* that in absence of language expressly denying federal jurisdiction, permissive grant of jurisdiction to state court did not prevent removal of claim.); *Barrow v. Harris Corp.*, 2004 WL 2713276 (W.D. Tex. 2004) (Applies *Breuer* rule that permissive statutory right to maintain action in state court does not displace federal jurisdiction in context of concurrent right to bring ERISA claims in state or federal court.); *Hodge v. Dogencorp*, 2005 WL 1668535 (M.D. Fla. July 13, 2005) (Applies *Breuer* rule in a FLSA removal and motion for remand context, denying motion to remand.).

<sup>2</sup> Plaintiff notes for the Court that 28 U.S.C. §1331 was asserted by the plaintiff in Paragraph 3 of his original Complaint as an alternative basis for jurisdiction. Additionally, while the 1998 USERRA amendment removed any specific venue provision for a private suit against a state as an employer, the plaintiff also asserted the propriety of venue in this matter pursuant to 28 U.S.C. §1391(b) in Paragraph 4 of his original Complaint.

1 circuit which issued the opinion at the root of defendants' argument has  
 2 subsequently recognized that the Supreme Court has reached the opposite  
 3 conclusion in analogous cases concerning federal jurisdiction. Therefore, the  
 4 plaintiff respectfully urges the Court to find that federal jurisdiction has been  
 5 established in this matter.  
 6

7  
 8 **ii. Defendant's Argument Fails to Distinguish Suits**  
 9 **Against the State of California and Individuals**  
 10 **Such as Defendant, Guizar-Maita.**

11 The USERRA definition of "employer" is as follows:

12 38 U.S.C. § 4303

13  
 14 **(4)(A) Except as provided in subparagraphs (B) and (C), the term**  
 15 **employer" means any person, institution, organization, or other**  
 16 **entity that pays salary or wages for work performed or that has**  
 17 **control over employment opportunities, including--**

18  
 19 **(i) a person, institution, organization, or other entity to whom the**  
 20 **employer has delegated the performance of employment-related**  
 21 **responsibilities;**

22  
 23 **(ii) the Federal Government;**

24  
 25 **(iii) a State;**

26  
 27 **(iv) any successor in interest to a person, institution, organization, or**  
 28 **other entity referred to in this subparagraph; and**

(v) a person, institution, organization, or other entity that has denied initial employment in violation of [section 4311](#).

(bold emphasis added).

Unlike most other employment related statutes, USERRA includes in its definition of an "employer" subject to suit for a USERRA violation "a **person**, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities; ." 28 U.S.C. § 4303(4). Every court which has considered the application of the USERRA definition of "employer" has held that it allows for the assertion of claims against individuals responsible for illegal acts, although in some cases the particular facts did not support such a claim. *See, Novak v. Mackintosh*, 919 F.Supp. 870, 877-878 (D.S.D. 1996) (Interpreting predecessor act, VRRRA, in light of USERRA legislative history which analogizes to the FLSA and statutory definition, finding that VRRRA and USERRA both include individuals as "employers" subject to liability.); *Jones v. Wolf Camera, Inc.*, 1997 WL 22678 (N.D.Tex. 1997) (USERRA definition of "employer" includes individuals and permits claims for liability on the part of individuals as an "employer."); *Brandsasse v. City of Suffolk, Virginia*, 72 F.Supp.2d 608, 617-618 (E.D. Va. 1999) (Denial of Motion to Dismiss, holding that city Director of Personnel who had authority over hiring

1 and firing, denied request for accommodation, and started pretextual investigation  
2 against Plaintiff could be sued pursuant to USERRA.).

3 Being that Plaintiff named Guizar-Maita as a Defendant (*See Generally,*  
4 Complaint), Plaintiff's complaint has indeed named two separate "employers" for  
5 purposes of USERRA. In Accordance with 38 U.S.C. § 4303, Plaintiff has  
6 named Alum Rock, *an institution or organization* and Guizar-Maita, *an*  
7 *individual person*.

8  
9  
10 Defendants do not dispute that USERRA provides a right of action against  
11 individuals. Rather, the Defendants downplay the facts as alleged in Plaintiff's  
12 complaint with regard to Guizar-Maita, who is a named Defendant. (*See*  
13 *Generally*, Memorandum of Points and Authorities in Support of Defendant's  
14 Motion to Dismiss). While the Defendants do little to address Guizar-Maita as an  
15 individually-named Defendant in their Memorandum in Support of their Motion  
16 to Dismiss, the inevitable question is whether individuals who are state  
17 supervisors, like Guizar-Maita, are subject to suit in federal court.  
18

19 Diligent research has revealed only one case which squarely confronted the issue  
20 of whether a USERRA plaintiff may sue state officials in their individual capacity  
21 when there is no jurisdiction for suit against the state employer, *Palmatier v.*  
22 *Michigan Dep't of State Police*, 981 F.Supp. 529, 532 (W.D. Mich. 1997). In  
23 *Palmatier* the plaintiff filed suit against the Michigan Department of Public  
24  
25  
26  
27  
28

1 Safety with two claims or theories of relief, one for breach of contract and the  
 2 other for alleged violations of USERRA. *Id.* at 530. The *Palmatier* court first  
 3 concluded that the Eleventh Amendment barred suit against Michigan for a  
 4 USERRA claim, Michigan had not waived the Eleventh Amendment immunity,  
 5 and therefore the court lacked jurisdiction to hear the plaintiff's USERRA claim  
 6 against the State of Michigan. *Id.* at 532. The *Palmatier* court, however, went on  
 7 to allow the plaintiff's USERRA claim to proceed against the supervisors named  
 8 in the suit, holding:

12 The same result [dismissal on Eleventh Amendment  
 13 grounds] obtains with respect to the USERRA claim  
 14 against defendants James Carter and Harold Raupp, to  
 15 the extent they are sued in their official capacities for  
 16 retroactive injunctive relief and damages. *Doe v.*  
 17 *Wiggington*, 21 F.3d 733, 736-737 (6<sup>th</sup> Cir. 1994)  
 18 (official capacity suit against state official for retroactive  
 19 relief is deemed to be against state itself and barred by  
 20 Eleventh Amendment). However, **the USERRA claim**  
 21 **against them in their official capacities for prospective**  
 22 **injunctive relief and in their individual capacities for**  
 23 **damages may proceed.** *Id.* at 737. (Official capacity suit  
 24 for prospective relief only is not barred by Eleventh  
 25 Amendment); *Hutsell v. Sayre*, 5 F.3d 996, 1003 (6<sup>th</sup> Cir.  
 26 1993), cert. denied, 510 U.S. 1119, 114 S.Ct. 1071, 127  
 27 L.Ed.2d 389 (1994), (Eleventh Amendment provides  
 28 state officials with no immunity from individual suit.)

1  
2 *Id.*

3  
4 The *Palmatier* court had to resolve whether the supervisors of a state  
5 employee, sued in their individual capacity under USERRA, took on the status of  
6 the state for jurisdictional purposes. Clearly, as recognized by the *Palmatier*  
7 court, nothing in USERRA requires that all defendant employers be neatly fit  
8 within a single category of state employers or private employers. When Congress  
9 wrote USERRA with a uniquely broad and reticulated definition of "employer",  
10 the intent was to give the employee the broadest possible range of options as to  
11 potential defendants in order to maximize the chances that a USERRA plaintiff  
12 could actually find, sue, and recover from a viable defendant. The plain language  
13 and structure of USERRA indicates that individuals who undertake  
14 discriminatory or violative acts are clearly meant to be a separate category of  
15 defendants.  
16

17  
18 Again, considering the foregoing, Plaintiff respectfully submits that it is  
19 clear that his claim against Guizar-Maita is one for relief pursuant to USERRA, a  
20 federal statute. Because 28 U.S.C. § 1331 specifically authorizes jurisdiction in  
21 federal district courts "of all civil actions arising under the Constitution, laws, or  
22 treaties of the United States," the U.S. District Court for the Northern District of  
23  
24  
25  
26  
27  
28



1 California has proper authority to hear Plaintiffs claims *against Guizar-Maita* as  
 2 *an individual* regardless of Plaintiff's claims against Alum Rock.

3  
 4 **iii. The Eleventh Amendment Does Not Bar a USERRA**  
 5 **Claim.**

6 The Defendants urge that the Plaintiff's claims are barred by the Eleventh  
 7 Amendment. (See Defendant's Memorandum In making this argument the  
 8 defendants relied heavily on two sources of authority.  
 9

10 First, the primary authority relied upon by the defendants is the original,  
 11 now partially vacated, opinion in *Valasquez v. Frapwell*, 160 F.3d 389 (7<sup>th</sup> Cir.  
 12 1998), vacated in part, 165 F.3d 593 (1999). In any event, it should be noted that  
 13 the very portion of the opinion relied upon by defendants for support of their  
 14 Eleventh Amendment sovereign immunity argument is no longer valid law  
 15 according to the very court which issued the opinion. Second, the defendants also  
 16 relied on the Supreme Court's holding in *Seminole Tribe of Florida v. Florida*,  
 17 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) that Congress could not  
 18 regulate Indian Gaming pursuant to its Article I powers. *Seminole* in no way  
 19 addressed Congress's Article I War Powers.  
 20  
 21  
 22  
 23  
 24

25 Contrary to *Seminole Tribe*, in *Alden v. Maine*, 527 U.S. 706 (1999), the  
 26 Court held that what is known as Eleventh Amendment immunity is actually a  
 27 preexisting fundamental aspect of the states pre-ratification sovereignty, subject  
 28

1 to alteration by the "plan of the [Constitutional] Convention or certain  
2 constitutional Amendments. *Id.* at 713. The logical extension of the *Alden* Court's  
3 conclusion was that, contrary to the Court's dicta in *Seminole Tribe*, Article I  
4 powers could in fact abrogate sovereign immunity: "In exercising its Article I  
5 powers Congress may subject the States to private suits in their own courts only  
6 if there is 'compelling evidence' that the States were required to surrender this  
7 power to Congress pursuant to Constitutional design." See *Id.* at 730-31.

10 In 2006 in *Central Virginia Community College v. Katz*, 546 U.S. 356  
11 (2006), specifically held that Congress could abrogate sovereign immunity  
12 pursuant to its Article I powers, holding that the Article I, §8 Bankruptcy Clause  
13 represents one such power. In doing so, the Court retracted its *Seminole Tribe*  
14 reasoning completely, stating:  
15  
16

17 We acknowledge that statements in both the majority and  
18 the dissenting opinions in *Seminole Tribe* reflected an  
19 assumption that the holding in that case would apply to  
20 the Bankruptcy Clause. Careful study and reflection have  
21 convinced us, however, that that assumption was  
22 erroneous. For the reasons stated by Chief Justice  
23 Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed.  
24 257 (1821), we are not bound to follow our dicta in a  
25 prior case in which the point now at issue was not fully  
26 debated.  
27  
28

1 See *Katz*, 546 U.S. at 363.

2 Following the Court's reasoning in *Alden* that "limits implicit in the  
3 constitutional principle of sovereign immunity strike the proper balance between  
4 the supremacy of federal law and the separate sovereignty of the States," see  
5 *Alden*, 527 U.S. at 710, the *Katz* Court opened a clear avenue to overcome state  
6 assertions of sovereign immunity pursuant to Article I powers, on the basis of  
7 implied waiver. Under the newly articulated standard, waiver of sovereign  
8 immunity need not be as explicit as consent, nor must Congress even expressly  
9 abrogate state immunity.<sup>3</sup>

13 Like the Bankruptcy Clause at issue in *Katz*, it is also appropriate to presume  
14 that the Framers of the Constitution were familiar with the contemporary legal  
15 context when the war powers clauses were adopted. The *Katz* Court emphasized  
16 that the need for *uniformity* in bankruptcy was the historical basis upon which the  
17 Bankruptcy Clause was adopted, indicating the States' waiver of immunity in that  
18 arena. See *Id.* at 366, 368. Similarly, it has long been held that "*the common*  
19 *defense* was one of the purposes for which the people ordained and established the  
20 Constitution [such that] we need not refer to the numerous statutes that  
21 contemplate defense of the United States, its Constitution and laws, by armed  
22

---

26 <sup>3</sup> Even a brief perusal of USERRA reveals, however, that there is ample evidence that Congress intended that States  
27 be subject to suit through the numerous references to suits against the states in USERRA. Particularly telling is the  
28 remedies provision contained in 38 U.S.C. §4323(d)(3), which explicitly makes states subject to the same remedies  
as any private employer.

1 citizens.” *See United States v. Macintosh*, 283 U.S. 605, 620 (1931), thus  
2 furnishing a similar basis upon which States’ should be deemed to have waived  
3 immunity in the war powers context.  
4

5 Finally, the principle that Congress’ war powers were intended to be  
6 complete and absolute when written into the Constitution has long been recognized  
7 by the Supreme Court, another indication that States’ waived their immunity when  
8 the war powers were ratified:  
9

10  
11 Whatever tends to lessen the willingness of citizen to  
12 discharge their duty to bear arms in the country’s defense  
13 detracts from the strength and safety of the  
14 government ... The Constitution, therefore, wisely  
15 contemplating the ever-present possibility of war,  
16 declares that one of its purposes is to ‘provide for the  
17 common defense.’ In express terms Congress is  
18 empowered ‘to declare war,’ which necessarily connotes  
19 the plenary power to wage war with all the force  
20 necessary to make it effective; and ‘to raise armies’  
21 (Const. Art. 1 §8, cl. 11, 12), which necessarily connotes  
22 the like power to say who shall serve in them and in what  
23 way.  
24

25 See *Id.* at 622.  
26  
27  
28

Thus, there is ample authority for the proposition that the Eleventh Amendment does not generally operate to bar the assertion of a USERRA claim against a state.

## **VI California Law Regarding Immunity of School Districts Should Not Be Applied in a USERRA Context.**

38 U.S.C. § 4323(j) provides, the term "private employer" includes a political subdivision of a State. While the Defendants aver that "California school districts are considered arms of the state for purposes of the Eleventh Amendment" (*See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 9), Plaintiff argues that they are "employers" and political subdivisions of the state for purposes of USERRA, which should not be afforded the typical immunity California has allowed with regard to its school districts.

Defendants are correct in their assertion that individuals may sue "private employers" in federal court for alleged USERRA violations . . ." (*See* Defendant's Memorandum in Support of Defendant's Motion to Dismiss). However, Defendant's argue "while USERRA defines 'private employers' to include 'political subdivisions of a State . . . in the context of the 1998 amendments this can mean only political subdivisions of the State not considered the State for purposes of Eleventh Amendment immunity.'" (*Id.* at 8). However,

for reasons discussed above, USERRA claims are not barred by the Eleventh Amendment.<sup>4</sup> Furthermore, California's Law regarding the immunity of California school districts has not been, and should not be, applied in the context of USERRA.

38 U.S.C. §4302(b) provides,

This chapter supersedes any State Law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Defendants are correct in noting that, typically, California school districts are typically considered "arms of the state" for purposes of Eleventh Amendment immunity in accordance with *Belanger v. Madera*, 963 F.2d 248 (9<sup>th</sup> Cir. 1992), *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, etc. However, USERRA is not a typical cause of action. The fact is, application of rules with regard to school districts would leave the reservist Plaintiff with absolutely no form of relief in the wake of a USERRA violation.

Such absolute immunity is disruptive to the purpose and scope of USERRA, which, as mentioned previously, is: 1.) to encourage non-career military service, 2.) minimize disruption to the lives of military reservists, and 3.) prevent

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<sup>4</sup> Article I powers can abrogate sovereign immunity.

1 discrimination against military reservists on the basis of their service. 38 U.S.C.  
2 §4301. To allow California's school districts to ignore USERRA based on  
3 sovereign immunity would render the statute impotent with regard to any military  
4 reservist employee working at any school in California. There is neither  
5 likelihood nor guarantee that California would waive Eleventh Amendment  
6 immunity thus allowing military reservists to obtain relief in regard to the  
7 discriminatory practices of California school-districts. This, of course, ensures no  
8 relief for soldiers who normally are afforded the legislative protections of  
9 USERRA. If California's laws with regard school-district immunity area applied  
10 in a USERRA context, those laws thus directly violate 38 U.S.C. §4302(b) and  
11 Article VI, Clause 2 of the United States Constitution, which reads:  
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16 This Constitution, and the Laws of the United States  
17 which shall be made in Pursuance thereof; and all  
18 Treaties made, or which shall be made, under the  
19 authority of the United States, shall be the supreme Law  
20 of the land; and the Judges in every State shall be bound  
21 thereby, any Thing in the Constitution or Laws of any  
22 State to the Contrary notwithstanding.

23 Rather than attempt to comport USERRA with cases such as *Belanger*,  
24 which do not involve USERRA claims, this Honorable Court should look to cases  
25 such as *Carpenter v. Tyler Independent School Dist.*, 226 F.Supp.2d 848  
26 (E.D. Tex. 2006) and *Smith v. School Bd. of Polk County, Florida*, 205  
27  
28

1 F.Supp.2d 1308 (M.D.Fla.2002), which allowed USERRA claims to be pursued  
2 against school-districts.

3 Further, while these Defendants attempt to hide behind the veil of the State.  
4 For purposes of USERRA, the State itself is an “employer” subject to the  
5 provisions and remedies afforded by USERRA. The Court in *Mayer v. City of*  
6 *Chicago* explains the relation of “the State” to USERRA:  
7

8 Under USERRA, a “State” is subject to “the same  
9 remedies [one of which is liquidated damages under §  
10 4323(d)(1)(C) ], including prejudgment interest, as may  
11 be imposed upon any private employer under this  
12 section.” 38 U.S.C. § 4323(d)(3). USERRA defines  
13 “private employer” as including “a political subdivision  
14 of a State.” 38 U.S.C. § 4323(j). **The general definition**  
15 **section of USERRA includes a State within its**  
16 **definition of an employer**, 38 U.S.C. § 4303(4)(a)(iii),  
17 and the term State is defined to include each of the  
18 several states of the United States, including its agencies  
19 and political subdivisions. *Id.* at § 4303(14).

20 *Mayer v. City of Chicago*, 463 F.Supp.2d 837, 841 (N.D. Illinois 2006).

21 Considering the forgoing, Defendant’s argument that the school-district is  
22 merely an “arm of the state” which, in turn, subjects it to Eleventh Amendment  
23 immunity is an attempt to circumnavigate USERRA by employing a loophole  
24 which was never anticipated to exist under the statute. Defendant’s arguments are  
25 adverse to legislative intent as well as the purpose and scope of USERRA. In  
26 fact, the legislature is currently attempting to shut down arguments, like  
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Defendant's by passing the "Servicemembers Access to Justice Act of 2008<sup>5</sup>," which proposes to amend USERRA as follows:

(a) In General- Section 4323 of title 38, United States Code, is amended--

(1) in subsection (b) by striking paragraph (2) and inserting the following new paragraph:

`(2) In the case of an action against a State (as an employer) by a person, the action may be brought in the appropriate district court of the United States or State court of competent jurisdiction.';

(2) by redesignating subsection (j) as subsection (k); and

(3) by inserting after subsection (i) the following new subsection:

`(j) Waiver of State Sovereign Immunity- (1) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by--

`(A) a person who is or was an employee in that program or activity for the rights or benefits authorized the person by this chapter;

As is clear from the original legislation as well as the proposed Amendments to USERRA, Congress' intent in the creation of USERRA was to allow the maximum amount of relief which could possibly be afforded to our military reservist. Under the proposed law, there will be no doubt that Plaintiff's

<sup>5</sup> Sponsored by Senator Barack Obama and Senator Ted Kennedy

1 claim against the school-district, even if categorized as an arm of the state, may  
2 be heard in the appropriate district court of the United States as well as the  
3 appropriate State court. Because of arguments and cases cited by the Defendants  
4 like *Valadez*, it has become necessary for Congress to further clarify the purposes,  
5 goals and reach of USERRA.  
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7  
8 **VII. California's GTCA does not bar Plaintiff's Claims under California's**  
9 **Military and Veteran's Code**

10 The Defendants argue that GTCA requires that "any party with a claim for  
11 money or damages against a public entity must first file a claim directly with that  
12 entity; only if that claim is denied or rejected may the claimant then file a law  
13 suit." (*See* Memorandum in Support of Defendant's Motion to Dismiss at 15).  
14 However, Government Code § 905 exempts the form of claims at issue in this  
15 case, which are "claims by public employees for fees, salaries, wages, mileage, or  
16 other expenses and allowances" and "applications or claims for money or benefits  
17 under any public retirement or pensions system."  
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21 Furthermore, Plaintiff's State claims under California's Military and  
22 Veteran's Code are incidental and pendant to Plaintiff's claims under USERRA,  
23 which allows Plaintiffs to consult counsel at any time in accordance with 38  
24 U.S.C. § 4323. Furthermore, because the school-district itself is not the proper  
25 venue for filing of a USERRA claim, the Plaintiff filed its relevant USERRA  
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1 claims, along with its state claims, with the U.S. District Court for the Northern  
2 District of California rather than with the school-district itself.

### 3 **VIII. Conclusion**

4  
5 U.S.C. 38 §4323(b)(1)-(3) provides only a permissive grant of authority  
6 for Plaintiffs as private citizens to bring action against state employers, and that  
7 option in no way negates the provisions of 28 U.S.C. §1331, which provides for  
8 federal jurisdiction in cases which “arise under” federal law. Furthermore, 38  
9 U.S.C. §4303, in conjunction with 28 U.S.C. §1331, allows for claims against  
10 individuals as employers in federal court. Also, there is ample authority for the  
11 proposition that the Eleventh Amendment does not generally operate to bar the  
12 assertion of a USERRA claim against a state. The primary goal of USERRA is to  
13 maximize the chance that a servicemember can seek relief for discrimination  
14 against him on the basis of his military service. Allowing the Defendants absolute  
15 immunity as an “arm of the State” violates the purpose and scope of USERRA  
16 and renders the statute useless to all reservists employed in the school-districts of  
17 California.  
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23 For the forgoing reasons, this Court should **DENY** the Defendant’s Motion  
24 to Dismiss.  
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28

Dated this 1<sup>st</sup> day of September, 2008.

Respectfully Submitted:

s/George C. Aucoin

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***COUNSEL FOR PLAINTIFF***

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 1<sup>st</sup> day of September, 2008, I electronically filed the foregoing with the Clerk of Court CM/ECF system, which will automatically send notice to all counsel of record.

s/George C. Aucoin

GEORGE C. AUCOIN